No. 17-1104

In The Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., ET AL.,

Petitioners,

v.

ROBERTA G. DEVRIES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF EVELYN HUTCHINS, FLORA EVERETT, AND JAMES T. MCALLISTER AS *AMICI CURIAE* SUPPORTING RESPONDENTS

LISA SHIRLEY
Counsel of Record
CHARLES W. BRANHAM, III
DEAN OMAR & BRANHAM, LLP
302 N. Market St., Suite 300
Dallas, Texas 75202
(214) 722-5990
lshirley@dobllp.com

ALAN KELLMAN
THE JAQUES ADMIRALTY LAW FIRM, PC
1370 Penobscot Building
654 Griswold St.
Detroit, Michigan 48226
(800) 521-8064

[Additional Counsel Listed Inside Front Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MELISSA SCHOPFER
SIMMONS HANLEY CONROY
1 Court St.
Alton, Illinois 62002
(618) 259-2222

FRANK J. SWARR
LANDRY & SWARR, LLC
1010 Common St., Suite 2050
New Orleans, Louisiana 70112
(504) 299-1214

JEFFREY O'CONNELL
THE NEMEROFF LAW FIRM
12720 Hillcrest Rd.,
Suite 700
Dallas, Texas 75230
(214) 774-2258

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INTEREST OF *AMICI CURIAE*[1]

Amici are two widows and a dying man. They are but three of the many thousands of persons affected by mesothelioma, an "invariably fatal cancer . . . for which asbestos exposure is the only known cause. . . ." *In re Patenaude*, 210 F.3d 135, 138 (3d Cir.), cert. denied, 531 U.S. 1011 (2000). Mesothelioma kills its victims "generally within two years of diagnosis[,]" during which time "[m]esothelioma victims invariably suffer great pain and disability." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir.), aff'd, 521 U.S. 591 (1997).

Evelyn Hutchins is the widow, and administrator of the estate, of Raymond Hutchins, Jr. Mr. Hutchins was a graduate of the Maine Maritime Academy. He began sailing for Lykes Brothers in 1967 as a Third Assistant Engineer. In 1979 he achieved the rank of Chief Engineer and continued in that capacity until he retired from Lykes in July of 1999. He mentored many young engineers during his tenure as Chief. As an engineer, he was constantly exposed to asbestos-containing products on every vessel on which he sailed. Mr. Hutchins was diagnosed with mesothelioma in February, 2018, caused by his exposure to asbestos on ships. Mr. Hutchins passed away from the disease in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* confirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have granted blanket consent to the filing of *amicus* briefs.

June, 2018. Mrs. Hutchins is about to file suit in state court to recover damages for his death.

Flora Everett is the widow and representative of Willie Everett, who enlisted in the Navy in 1955 and served until 1985. During his service he fought in the Vietnam War and helped recover the Apollo IV spacecraft. During his service, Mr. Everett was assigned to ten different ships, and also served three extended tours of shore duty. He was promoted through the ranks of Machinist Mate to Machinist Mate, Master Chief and was selected as a Chief Warrant Officer 04. Throughout his service, he was regularly exposed to asbestos when he repaired and maintained asbestos-containing pumps, valves, boilers, turbines, and other equipment. He relied on the equipment manufacturer's drawings and manuals for instructions about how to perform this work safely. He was never warned about the dangers of asbestos. Had he known them, he would have protected himself and the men under his command.

After Mr. Everett retired, he became a high school ROTC instructor so that he could help provide young people the opportunities the Navy provided to him. Mr. Everett was diagnosed with mesothelioma in November, 2016, and died in July, 2017. His total medical bills were over $170,000. Mrs. Everett originally filed suit in Missouri, but after adverse rulings on personal jurisdiction her claims are now pending in the United States District Court for the Southern District of New York and in state court in New Jersey.

James T. McAllister served in the Navy on submarines, from 1964 to 1972. He regularly performed equipment maintenance that entailed heavy asbestos exposure. He is dying of mesothelioma. His action for damages is pending in the United States District Court for the Middle District of Louisiana.

Each of *amici*'s cases may be governed by maritime law. *Amici* thus have a strong interest in the outcome of this case. *Amici* file this brief to apprise the Court of the reality behind petitioners' relentless invocation of the Navy as a means of deflecting responsibility.

SUMMARY OF ARGUMENT

Petitioners strive to create the impression that the asbestos tragedy is really the Navy's fault, but the Court should ignore this contention. The government contractor defense is fully available to petitioners upon remand. The Court's holding in this case, moreover, will affect all suits governed by maritime law, not just those involving the Navy. What the Navy did or didn't do regarding asbestos is irrelevant to the question before the Court.

Beyond these threshold issues of relevance, the Court should understand that this defense has been invoked by defendants in asbestos cases for decades. It has been singularly unsuccessful. Courts have consistently recognized that the Navy never forbade

contractors from warning of the hazards of their products.

ARGUMENT

A pervasive theme running through the briefs of petitioners is that the tragedy of asbestos disease and death among sailors was really all the Navy's fault; the petitioners did nothing more than sell the Navy the products it wanted. Petitioners' brief at 3-8; brief of General Electric Co.[2] at 5-8, 23-46, 41-42. The Court should disregard this argument entirely, both for threshold reasons of relevance and because it is utterly meritless. This is an ancient contention in asbestos litigation that has been repeatedly rejected.

As to its relevance in the case before the Court, as respondents note the defense is not before the Court here, and remains fully available to petitioners on remand. Beyond this case, as respondents also note, the Court's holding will apply in all maritime cases, and not just those involving the Navy or those involving asbestos.[3] Mrs. Hutchins' suit is one such case, as it involves exposure to asbestos aboard merchant ships. As such, the arguments about the Navy should be ignored.

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[2] General Electric Co. is technically a respondent pursuant to Supreme Court Rule 12.6, but its interests are aligned with those of petitioners.

[3] *Amici* do not necessarily concede that all, or any, of their claims are governed by maritime law. That issue remains for development in their cases. Maritime law's application is assumed for purposes of this brief.

As set forth below, in any event, petitioners' arguments on this score are unavailing and have been rejected for decades.

I. COURTS HAVE CONSISTENTLY REJECTED THE GOVERNMENT CONTRACTOR DEFENSE IN ASBESTOS CASES FOR DECADES

Since at least the 1980s, defendants in asbestos cases have tried to blame the Navy. Defendants typically sought to bar liability entirely by involving the government contractor defense as a complete bar to liability and a formal ground for summary judgment. A number of defendants also sought indemnification from the United States. Those attempts have virtually always failed, for there is no basis to conclude as a matter of law that defendants were ever prohibited from warning about the dangers of their products. As detailed below, courts have consistently denied summary judgment on this basis, and have indeed granted summary judgment to the United States.

A. The Requirements of the *Boyle* Defense

The contention that the Navy forbade warnings on asbestos-containing products or equipment is a plea for immunity under the defense articulated by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In that case, Marine helicopter pilot David Boyle was killed after his helicopter crashed off the coast of Virginia. Although he survived the impact, he drowned because the helicopter's escape hatch opened

outward and he could not overcome the water pressure once the craft was submerged. Boyle's father sued the helicopter manufacturer, alleging that it defectively designed the emergency escape system, even though the government contract specified that the hatch must open outward. The Fourth Circuit reversed a jury verdict for plaintiff, and this Court granted certiorari to consider if and when federal law provided a defense for government contractors to state tort claims.

The Court held that contractors are immune from liability in some instances, in which their duties under Government contracts conflict with duties posed by state tort law. In *Boyle*, the "state-imposed duty of care that [was] the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) [was] precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications)." *Id.* at 509. Not every Government contract, however, gives rise to a conflict:

> [I]t is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of

> care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be preempted in this context.

Id. at 509. It is thus essential to the *Boyle* defense that the contractor show a clear conflict between the tort duties sought to be imposed by the plaintiff, and the contractual duty imposed by the Government contract. The tort duty must be "precisely contrary," in Justice Scalia's terms, to the contractual duty.

The existence of a conflict between the tort duty and the contractual duty is only the first step in the *Boyle* analysis, however, because "[e]ven in this sort of situation, it would be unreasonable to say that there is always a 'significant conflict' between the state law and a federal policy or interest." *Id.* at 509, quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). In addition to a conflict between tort duties and contractual duties, a defendant must also show that, with respect to the "feature in question," the Government (1) approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.* at 512.

The central "feature in question" in asbestos litigation, of course, is the lack of any warnings of the hazards of asbestos exposure. Defendants must therefore prove the following as a matter of law:

> 1. The duty imposed by state law—to provide warnings—was "precisely contrary" to a duty imposed by Government contracts to not provide warnings.
>
> 2. The United States approved reasonably precise specifications to not provide warnings.
>
> 3. Defendants' products conformed to the specification to not have warnings.
>
> 4. Defendants warned the United States about dangers known to them but not to the United States.

The fundamental reason why the *Boyle* defense has never succeeded in asbestos litigation is that the *Navy never forbade warnings*. The first element of the defense has never been met. As a result, summary judgment on this basis has consistently been denied. While defendants are free to raise the defense at trial—as petitioners are here—it has never been a bar to liability.

B. The Navy's Official Position in Litigation Is That Nothing Prevented Product Manufacturers From Warning of the Hazards of Asbestos

In the 1980s, a number of asbestos product manufacturers began to sue the United States for indemnity, seeking reimbursement for verdicts or settlements they had paid to plaintiffs in tort suits. These manufacturers made exactly the same contention that petitioners make here: that the Navy required the use of asbestos in the products it purchased, and that compliance with Navy specifications required the defective features in the products that caused the tort plaintiffs' injuries. The manufacturers insisted that they did not know of the hazards of asbestos, and that in any event they were not permitted to warn about them under their contracts with the Navy.

Every one of these suits was unsuccessful, and in some instances summary judgment was granted for the Government.[4] The position of the United States Government was clear: Navy specifications did not forbid in any way the placement of warnings concerning asbestos exposure.

For example, GAF Corp. was the successor to Ruberoid Co., a maker of commercial asbestos insulation products. For several decades beginning in the 1930s,

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[4] There were ultimately eleven such cases. *See GAF Corp. v. United States*, 19 Cl. Ct. 490, 491 (1990), aff'd, 931 F.2d 947 (Fed. Cir.), cert. denied, 502 U.S. 1071 (1992). Third-party indemnification claims were also brought, none of which succeeded. *Id.* at 493.

Ruberoid sold asbestos products to the Navy. *GAF Corp. v. United States*, 19 Cl. Ct. 490, 494-95 (1990), aff'd, 931 F.2d 947 (Fed. Cir.), cert. denied, 502 U.S. 1071 (1992). GAF sued the United States in 1983 "for implied contractual indemnification for damages sustained as a result of actions by or on behalf of shipyard workers to recover for injuries or death due to exposure to asbestos." *Id.* at 490-91. GAF propounded discovery to the United States, and in response to that discovery, the Navy denied that it ever precluded contractors from warning about the hazards of asbestos. *See Willis v. Buffalo Pumps, Inc.*, 34 F. Supp. 3d 1117, 1126 (S.D. Cal. 2014) ("[I]n litigation brought against the Navy by contractors seeking indemnification for asbestos claims, the Navy itself denied that its specifications barred a contractor's ability to provide an asbestos warning.").[5]

The United States was awarded summary judgment on all of GAF's claims. After an exhaustive review of the evidence and other similar cases, the court

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[5] The *Willis* opinion describes some of the other evidence to this effect, including, for example, the testimony of petitioners' witness Dr. Betts. *See* GE's brief at 5; *Willis*, *supra*, 34 F.3d at 1126-27 ("[P]laintiff notes that defendant's expert, Dr. Betts, testified that he knew of no instance in which the Navy rejected a manufacturer's safety warning, that he didn't know if the Navy would have forbidden a safety warning, and that Naval equipment did include safety warnings about the hazards of asbestos by the 1970s."). It should be borne in mind that there is a great deal of evidence about the Navy's position with regard to warnings that is not in the present record. That is undoubtedly because the *Boyle* defense is available to petitioners, but is yet to be litigated.

held that "the losses suffered by plaintiff were occasioned by its own tort liability, *viz.*, liability for failure to place warnings on its asbestos products." *GAF Corp., supra*, 19 Cl. Ct. at 503, citing *Lopez v. ACandS, Inc.*, 858 F.2d 712, 717 (Fed. Cir. 1988), cert. denied, sub nom. *Eagle-Picher Indus., Inc. v. United States*, 491 U.S. 904 (1989).

This summary judgment was affirmed by the United States Court of Appeals for the Federal Circuit. In language that succinctly disposes of petitioners' contentions here, the Federal Circuit recognized that "[n]othing in the contract specifications prevented Ruberoid from putting warnings on its products. These asbestos supply contract specifications, whether design or performance, did not cause Ruberoid's tort losses." *GAF Corp. v. United States*, 923 F.2d 947, 950 (Fed. Cir. 1991), cert. denied, 502 U.S. 1071 (1992).

No defendant in asbestos litigation has ever produced any communication from the Navy (or any other defense branch, or any other state or federal governmental entity of any kind), directing a manufacturer of any asbestos containing product not to include a warning concerning asbestos exposure. As shown above, the Navy's official position is to the contrary. It is thus no surprise that the *Boyle* defense has never carried the day in asbestos cases.

C. The Defense Has Been Overwhelmingly Rejected in Asbestos Cases

Many courts around the country have applied *Boyle* to asbestos cases. Almost without exception

those courts have held that there was no conflict between defendants' state law duties to warn, and any duties imposed on defendants by Government contracts. Any number of cases might be cited.

In *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990), for example, the Second Circuit upheld, on interlocutory appeal, the district court's denial of defendant's motion for summary judgment on the *Boyle* defense, noting the "crucial lack of the necessary conflict between state and federal warning requirements." *Id.* at 631. The Second Circuit got to the heart of *Boyle*:

> Stripped to its essentials, the military contractor's defense under *Boyle* is to claim, "the Government made me do it." *Boyle* displaces state law only when the Government, making discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion.

Id. at 632.

The Ninth Circuit addressed the same contentions in *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992). There, the district court struck defendants' pleading raising the *Boyle* defense, on the ground that the defense could only apply to military equipment. Since the same asbestos products were manufactured for commercial purposes, the district court reasoned, the defense would not apply. On appeal,

the Ninth Circuit held that even if *Boyle* applied to non-military equipment, the record would not have supported invocation of the defense, because the manufacturer could easily have complied with both their state law and contractual duties:

> *The appellants conceded in the district court that the Navy in no way prohibited them from placing warnings on their insulation products. They could have provided detailed and prominent statements regarding the dangers of asbestos insulation without violating the terms of their procurement contracts or their product specifications.* There thus existed no conflict between their state law duty to provide adequate warnings to the users of their insulation and the conditions imposed on them pursuant to the agreements they had entered into with the Government.
>
> As a result, a crucial element of the military contractor defense as defined in *Boyle* is missing. Owens-Illinois and Fibreboard have simply failed to allege, let alone establish, that in making their decisions regarding warnings they were acting in compliance with "reasonably precise specifications" imposed on them by the United States. . . . Here, the Government did not require Fibreboard or Owens-Illinois to do anything with respect to the placement of warnings on their products. Nothing in *Boyle* suggests preemption of a state law duty to warn under such circumstances.

Id. at 812-13 (emphasis added).

In *Faulk v. Owens-Corning Fiberglas Corp.*, 48 F. Supp. 2d 653 (E.D. Tex. 1999), numerous defendants removed a group of asbestos cases on federal-officer jurisdiction grounds. The district court rejected this basis for removal, because the necessary "colorable federal defense" did not exist:

> [B]ecause the federal government provided no direction or control on warnings when using asbestos; moreover, the federal government did not prevent Defendants from taking their own safety precautions heeding state-law standards above the minimum standards incorporated in their federal contracts. . . . Defendants can bury this Court in federal government regulations controlling their actions. But if there is no causal nexus between Defendants' actions in response to this control and the Plaintiffs' claims, then the government did not "make them do it" since the "it" was never under government control.

Id. at 663 & n.14. Many other courts have remanded asbestos cases removed on this ground for the same reason. *See, e.g., Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp. 2d 187 (D. Mass. 2008) ("there is simply no basis upon which the Court can conclude that a conflict existed between the federal contracts and the defendants' state-law duty to warn."); *Green v. A.W. Chesterton Co.*, 366 F. Supp. 2d 149, 155 (D. Me. 2005); *Freiberg v. Swinerton & Walberg Prop. Serv., Inc.*, 245 F. Supp. 2d 1144, 1155 (D. Colo. 2002); *Cardaro v. Aerojet General Corp.*, 2010 WL 3486207, *5 (E.D. La. Aug. 27, 2010) ("there is no evidence that the Navy

prevented Crane from complying with state-law duties to warn of the danger of asbestos contained in any product that Crane supplied to the Navy."); *Luce v. A.W. Chesterton Co.*, 2010 WL 2991671, *2 (N.D. Cal. July 25, 2010) ("Rockwell does not, however, assert, let alone offer evidence to show, that it proposed any type of warning to the Navy, much less that the Navy considered and rejected a warning."); *Glein v. Boeing Co.*, 2010 WL 2608284, *3 (S.D. Ill. June 25, 2010) ("Indeed, not only is there no evidence that the US Navy prevented UTC from complying with state-law duties to warn of the danger of asbestos . . . , but Mrs. Glein's counsel have adduced evidence that the US Navy expected manufacturers to supply warnings concerning hazardous substances in military equipment in accordance with state law."); *Weese v. Union Carbide Corp.*, 2007 WL 2908014 (S.D. Ill. Oct. 3, 2007); *Epperson v. Northrop Grumman Sys.*, 2006 WL 90070 (E.D. Va. Jan. 11, 2006); *Mouton v. Flexitallic, Inc.*, 1999 WL 225438 *2 (E. D. La. Apr. 14, 1999) ("The federal government provided no direction on warnings when using asbestos, and further did not prevent Avondale from taking its own safety precautions above the minimum standards incorporated in the federal contracts. Thus, the Court finds that Avondale has failed to establish a causal connection between the Navy's direction pursuant to the design contracts and plaintiff's failure to warn claims.").[6]

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[6] In 2011, Congress made orders of remand, in cases removed on federal-officer jurisdiction grounds, reviewable. 28 U.S.C. §1447(d). Since then, some courts of appeals have held that the *Boyle* defense is "colorable," and therefore that federal officer

In sum, the consistent verdict of courts for three decades has been that the Navy's historical actions with regard to asbestos do not serve to bar asbestos plaintiffs' claims. The Court should ignore the suggestions otherwise that pervade petitioners' briefs.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

LISA SHIRLEY
Counsel of Record
CHARLES W. BRANHAM, III
DEAN OMAR & BRANHAM, LLP
302 N. Market St., Suite 300
Dallas, Texas 75202
(214) 722-5990
lshirley@dobllp.com

MELISSA SCHOPFER
SIMMONS HANLEY CONROY
1 Court St.
Alton, Illinois 62002
(618) 259-2222

FRANK J. SWARR
LANDRY & SWARR, LLC
1010 Common St., Suite 2050
New Orleans, Louisiana 70112
(504) 299-1214

ALAN KELLMAN
THE JAQUES ADMIRALTY LAW FIRM, PC
1370 Penobscot Building
654 Griswold Street
Detroit, Michigan 48226
(800) 521-8064

JEFFREY O'CONNELL
THE NEMEROFF LAW FIRM
12720 Hillcrest Rd., Suite 700
Dallas, Texas 75230
(214) 774-2258

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jurisdiction exists in these cases. *E.g.*, *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249 (4th Cir. 2017); *Ruppel v. CBG Corp.*, 701 F.3d 1176 (7th Cir. 2012). These holdings, however, simply recognize the defense as a colorable one, not as a bar to liability. At best, there is a fact issue at trial on the *Boyle* defense.